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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICARDO JOSE HERDOCIA,

Defendant and Appellant.

A143691

(San Mateo County  
Super. Ct. No. SC080085A)

In this appeal, appellant, Ricardo Herdocia (appellant or Herdocia) challenges his conviction after a jury trial. His lone issue on appeal is a challenge to the assault instruction given by the trial court. He concedes the instruction given in this case, CALCRIM No. 860, complies with *People v. Williams* (2001) 26 Cal.4th 779 (*Williams*). He acknowledges this court is obligated to follow the holding in *Williams* and its discussion on the mens rea of assault. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450 (*Auto Equity*).) However, he wants the Supreme Court to revisit the *Williams* rationale. We affirm based on *Williams*.

**STATEMENT OF THE CASE**

On February 11, 2014, the District Attorney of San Mateo County filed an amended felony information charging appellant with assault with a deadly weapon on a peace officer in violation of Penal Code section 245, subdivision (c)<sup>1</sup> (count 1),

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<sup>1</sup> Unless otherwise stated, all statutory references are to the Penal Code.

exhibiting a deadly weapon to resist arrest in violation of section 417.8 (count 2), and resisting an executive officer in the performance of his duties in violation of section 69 (count 3). The information alleged several enhancements, one being the appellant used a deadly or dangerous weapon during the commission of counts 1 and 3. (§§ 1192.7, subd. (c); 12022, subd. (b).) The information also alleged the appellant was on probation at the time of the commission of these offenses, under section 1203, subdivision (k).

On April 8, 2014, appellant was found guilty after a jury trial of counts 2 and 3, and not guilty of count 1, but guilty of the lesser offense of assault on a peace officer, a violation of section 241, subdivision (c), a misdemeanor. The jury found true the allegation that appellant, in the commission of count 3, personally used a deadly weapon.

On May 9, 2014, appellant's motion for a new trial was denied. Sitting as a "13th juror," the court affirmed the jury's guilty verdicts on counts 2 and 3, and the jury's finding that appellant personally used a deadly weapon during the commission of count 3 within the meaning of section 12022, subdivision (b).<sup>2</sup> Appellant having previously waived jury on the allegations that counts 2 and 3 were serious felonies under section 1192.7, subdivision (c), the court also found those allegations true.

On November 25, 2014, the court placed appellant on probation with several conditions, including that he serve 318 days in the county jail on count 3, with credit for time served. The sentences on counts 1 and 2 were stayed pursuant to section 654. Appellant filed his notice of appeal on November 26, 2014.

### **STATEMENT OF FACTS**

On January 12, 2014, Officer Edgar Hernandez of the San Bruno Police Department was on duty in the afternoon. He was driving the standard black and white police vehicle. As Hernandez approached San Mateo Avenue, he observed appellant

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<sup>2</sup> The court also found true that "the special allegation as it applies to Count 2 . . . that he personally used a deadly weapon." However, personal use of deadly weapon was neither alleged in the information nor found true by the jury.

standing in the middle of the street. Cars on the road had to swerve to avoid hitting him. Appellant had a knife in his hand and it was raised in the air. The officer stopped his vehicle approximately five feet from the appellant's position. He asked appellant to exit the street and go to the sidewalk. The officer noticed appellant had the knife and a wristwatch in his hand. Appellant seemed to be focused on the knife in his hand. Concerned for public safety as well as appellant's, Hernandez repeated his request that appellant return to the sidewalk. In reply, appellant asked why and said he had not done anything wrong.

During this process, Hernandez observed appellant seemed under the influence, because he was sweating substantially and his eyes were dilated. He also appeared angry. As Hernandez began to exit his police car, appellant clenched his fist around the knife and lunged at the police car. He pushed Hernandez back into his vehicle. Appellant lowered the weapon downward towards the officer, with the thrust occurring within 12 to 18 inches of Hernandez's face. Appellant's arm continued to be extended after this thrust action.

The officer exited his car and directed appellant to drop the knife, which appellant continued to hold above his head. The officer called for additional assistance.

A shop owner near this confrontation, Leung, came out of his business and told appellant to drop the knife. Again, appellant did not respond to the call by Leung, but ran from the street. Eventually, police units arrived and subdued appellant. After being tased, appellant continued to struggle with the officers. Eventually he was handcuffed. Once arrested, appellant was searched and a pipe for methamphetamine use was found on his person.

In his defense, appellant testified regarding the events. The night before the confrontation, appellant had been sleeping in the shop of the witness Leung. He was upset and consumed considerable amounts of alcohol. The day of his arrest he had attempted to repair his watch with the knife he had when confronted by Officer

Hernandez. While standing on the sidewalk side of his car, adjusting the wristband of his watch, he accidentally dislodged the spring-loaded pin, which then jumped over the car and fell into the street. He went into the street to look for it and found it. As appellant stood in the middle of the street attempting to repair his watchband with his knife, Officer Hernandez arrived and the confrontation began. At first he was not aware what the police officer was saying, but then advised him he was fixing his watch with the knife. Even when Hernandez insisted appellant drop the knife, he continued to advise he was using it to repair his timepiece. Only when the officer insisted he drop the weapon did appellant raise it above his head and remind the officer appellant knew his rights.

Appellant also related the shopkeeper Leung came out from his business and told Herdocia to drop the knife. Appellant told Leung he had done nothing wrong but was holding the knife above his head to indicate to police he was being cooperative. Appellant acknowledged he fled the scene but never used the weapon in a thrusting motion towards the officer. He admitted possession of the pipe but had not used it in quite a while.

In rebuttal, Officer Hernandez testified appellant never stated he was fixing his watch when confronted. In fact, when the officer asked appellant what he was doing in the street, Herdocia never responded.

## **DISCUSSION**

The lone issue in this case is appellant's contention the jury was improperly instructed on the mental state for assault. He claims the CALCRIM instruction regarding assault is improper. He acknowledges the CALCRIM instruction given in this case is compatible with the holding in *Williams, supra*, 26 Cal.4th 779. Yet he argues *Williams* was incorrectly decided. He seeks further review of the issue before the California Supreme Court.

*Williams* holds the crime of assault is a general intent offense and does not require specific intent to inflict injury on a person. (*Williams, supra*, 26 Cal.4th at p. 782.) The

jury need only determine defendant (1) willfully committed an act which by its nature would probably and directly result in injury to another; and (2) was aware of facts that would lead a reasonable person to realize this was a direct and probable consequence of his or her act. (*Ibid.*) The crime of assault does not require an intent to cause the application of physical force or a substantial certainty the application of physical force will take place. (*People v. Colantuono* (1994) 7 Cal.4th 206, 214–220.)

In this case, the jury was given CALCRIM No. 860, “Assault on Firefighter or Peace Officer with Deadly Weapon or Force Likely to Produce Great Bodily Injury.” This particular instruction, in relevant part, stated:

“The defendant is charged in Count 1 with assault with a deadly weapon on a peace officer.

“To prove that the defendant is guilty of this crime, the People must prove that:

“1. The defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;

“2. The defendant did that act willfully;

“3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone;

“4. When the defendant acted, he had the present ability to apply force with a deadly weapon to a person;

“5. When the defendant acted, the person assaulted was lawfully performing his duties as a peace officer;

“AND

“6. When the defendant acted, he knew or reasonably should have known, that the person assaulted was a peace officer who was performing his duties.

“Someone commits an act willfully when he does it willingly or on purpose. It is not required that he intend to break the law, hurt someone else, or gain any advantage.

“[¶] . . . [¶]

“The People are not required to prove that the defendant actually intended to use force against someone when he acted.”

The jury was also advised the above instruction applied not only to the charged crime in count 1 but also section 241, the lesser included offense of count 1, on which the jury reached a guilty verdict.

We are bound to follow the holding of *Williams, supra*, 26 Cal.4th 779, and believe it properly applies to the facts of this case. (*Auto Equity, supra*, 57 Cal.2d. at p. 455.) These facts support the verdict of the jury. (*Jackson v. Virginia* (1979) 443 U.S. 307, 309; *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

#### **DISPOSITION**

The judgment is affirmed.

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DONDERO, J.

We concur:

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HUMES, P.J.

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BANKE, J.